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14 JOEL BENOLIEL, GREGG R.
DAUGHERTY, BRUCE E. HOSFORD
15 and DONALD S. JEFFERSON,

16 Plaintiffs/Petitioners,)
(
v.)

18 BLACKHAWK PARENT LLC, a
19 Delaware limited liability company, and
20 EOP OPERATING LIMITED
21 PARTNERSHIP, a Delaware limited
22 partnership,

21 Defendants/Respondents.

Case No. C 07-03001 RMW

**REPLY IN SUPPORT OF FIRST
AMENDED PETITION TO
COMPEL ARBITRATION**

Hearing Date: August 31, 2007
Hearing Time: 9:00 a.m.
Judge: Hon. Ronald M. Whyte

TABLE OF CONTENTS

	Page(s)
INTRODUCTION	1
ARGUMENT	2
I. DIVERSITY JURISDICTION IS PROPER, AND IN ANY EVENT PETITIONERS SHOULD BE ALLOWED TO TAKE JURISDICTIONAL DISCOVERY REGARDING THE ALLEGED WASHINGTON LIMITED PARTNER.....	2
A. Because the Washington Limited Partner Presumably Acquired Her Interest After the Petition Was Filed, the Court Has Diversity Jurisdiction.....	2
B. Alternatively, Petitioners Should Be Permitted To Take Discovery Regarding the Alleged Washington Limited Partner's Acquisition of Her Interest.....	4
II. THE COURT SHOULD REJECT RESPONDENTS' EFFORT TO STRIP "INDEPENDENT" OF ANY MEANING.....	5
III. RESPONDENTS' SLEW OF PROCEDURAL OBJECTIONS ARE WITHOUT MERIT	6
A. Respondents' Objection To "Standing" — Which Is Really a Challenge To Ripeness — Fails	6
B. The Court Has Personal Jurisdiction Over Blackhawk Parent	8
C. Venue Is Proper in This District	11
D. The Petition Is Proper Under the Tax Protection Agreement	13

TABLE OF AUTHORITIES**CASES**

		Page(s)
4	<i>ATSA of Cal. Inc. v. Continental Ins. Co.,</i> 702 F.2d 172 (9th Cir. 1987)	15
6	<i>Blake v. Dierdorff,</i> 856 F.2d 1365 (9th Cir. 1988)	5
7	<i>Champion Int'l. Corp. v. Bennett Forest Industrial, Inc.,</i> 637 F. Supp. 170 (D. Mont. 1986)	12
9	<i>Chiron Corp. v. Ortho Diagnostic Sys.,</i> No. 99-1538, 1999 U.S. Dist. LEXIS 17348 (N.D. Cal. Nov. 3, 1993)	6
10	<i>Clearwater Ins. Co. v. Granite State Ins. Co.,</i> No. 06-4472, 2006 U.S. Dist. LEXIS 74771 (N.D. Cal. Oct. 2, 2006)	6
12	<i>Colt's Mfg. Co. v. Devteck Corp.,</i> 961 F. Supp. 382 (D. Conn. 1997)	8
13	<i>Container Recovery, Inc. v. Shasta Northwest, Inc.,</i> No. 05-1749, 2007 U.S. Dist. LEXIS 42620 (D. Or. Jun. 11, 2007)	5
15	<i>Cummings v. FedEx Ground Pkg. Sys.,</i> 404 F.3d 1258 (10th Cir. 2005)	14
16	<i>Fireman's Fund Ins. Co. v. Sorema N. Am. Reins. Co.,</i> No. 94-3617, 1995 U.S. Dist. LEXIS 22236 (10th Cir. 2005)	15
18	<i>Green Tree Fin. Corp. v. Bazzle,</i> 539 U.S. 444 (2003)	14
19	<i>Hartford Accident & Indemnity Co. v. Equitas Reins. Ltd.,</i> 200 F. Supp. 2d 102 (D. Conn. 2002)	8
21	<i>Hartford Fire Ins. Co. v. Evergreen Org., Inc.,</i> 410 F. Supp. 2d 180 (S.D.N.Y. 2006)	10
22	<i>Hartog v. Jots, Inc.,</i> No. 03-2986, 2004 U.S. Dist. LEXIS 24267 (N.D. Cal. Jan. 9, 2004)	9
24	<i>In re Hawaii Fed. Asbestos Cases,</i> 960 F.2d 806 (9th Cir. 1992)	2, 3
25	<i>Howsam v. Dean Witter Reynolds,</i> 537 U.S. 79 (2002)	14

1 CASES (continued)

2 Page(s)

3	<i>nMotion, Inc. v. Env'tl. Tectonics Corp.,</i> 4 196 F. Supp. 2d 1051 (D. Or. 2001)	10
5	<i>Joe Boxer Corp. v. R. Siskind & Co.,</i> 6 No. 98-4899, 1999 U.S. Dist. LEXIS 9622 (N.D. Cal. Jun. 25, 1999)	8
7	<i>Largotta v. Banner Promotions, Inc.,</i> 8 356 F. Supp. 2d 388 (S.D.N.Y. 2005)	12
9	<i>Laub v. United States DOI,</i> 10 342 F.3d 1080 (9th Cir. 2003)	5
11	<i>Lynch v. Alaska Tanker Co., LLC,</i> 12 No. 03-2484, 2004 U.S. Dist. LEXIS 22930 (N.D. Cal. Nov. 4, 2004)	13
13	<i>MacCallum v. N.Y. Yankees Pshp.,</i> 14 392 F. Supp. 2d 259 (S.D.N.Y. 2005)	11
15	<i>Mann v. Tucson Dept. of Police,</i> 16 782 F.2d 790 (9th Cir. 1986)	3
17	<i>McGann v. Ernst & Young,</i> 18 102 F.3d 390 (9th Cir. 1996)	5
19	<i>Mediterranean Enters. v. Ssangyong Corp.,</i> 20 708 F.2d 1458 (9th Cir. 1983)	14
21	<i>Moser v. Bret Harte Union High Sch. District,</i> 22 366 F. Supp. 2d 944 (E.D. Cal. 2005)	4
23	<i>No Touch N. Am. v. Blue Coral, Inc.,</i> 24 No. 95-1103, 1997 U.S. Dist. LEXIS 16153 (C.D. Cal. May 30, 1997)	9
25	<i>OKI Am. v. Tsakanikas,</i> 26 No. 93-20728, 1993 U.S. Dist. LEXIS 19475 (N.D. Cal. Dec. 6, 1993)	10
27	<i>PNI, Inc. v. Leyton,</i> 28 No. 03-1344, 2004 U.S. Dist. LEXIS 13335 (D. Or. 2004)	6
29	<i>Reilly v. Chambers,</i> 30 215 F. Supp. 2d 759 (D. W.Va. 2002)	12
31	<i>Richmond v. Madison Mgmt. Group, Inc.,</i> 32 918 F.2d 438 (4th Cir. 1990)	9
33	<i>San Jose v. Price Waterhouse,</i> 34 No. 91-16489, 1993 U.S. App. LEXIS 6801 (9th Cir. Mar. 23, 1993)	5

1 CASES (continued)

2 Page(s)

3 <i>Sipper v. Capital One Bank,</i> 4 No. 01-9547, 2002 U.S. Dist. LEXIS 3881 (C.D. Cal. Mar. 1, 2002).....	4
5 <i>Sizova v. Nat'l. Inst. of Stds. & Tech.,</i> 6 282 F.3d 1320 (10th Cir. 2002)	5
7 <i>Tracer Rsrch. Corp. v. Nat'l. Env'tl. Servs. Co.,</i> 8 42 F.3d 1292 (9th Cir. 1994)	14
9 <i>U. S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.,</i> 10 241 F.3d 135 (2d Cir. 2001).....	10
11 <i>Vesta Fire Ins. Corp. v. Ins. Ventures, Inc.,</i> 12 No. 02:04-cv-0, 2006 U.S. Dist. LEXIS 24887 (E.D. Cal. Feb. 9, 2006)	5
13 <i>Wells v. Cingular Wireless LLC,</i> 14 No. 06-03191, 2006 U.S. Dist. LEXIS 73664 (N.D. Cal. Mar. 6, 2007).....	11

12 STATUTES AND RULES

13 9 U.S.C. § 4.....	7
14 9 U.S.C. § 5.....	14
15 28 U.S.C. § 1291.....	11
16 28 U.S.C. § 1391.....	11, 12
17 28 U.S.C. § 1927.....	4
18 CAL. BUS. & PROF. CODE § 6068	4
19 CAL. R. PROF'L. CONDUCT 2-100	4
20 FED. R. CIV. P. 12(b)	2
21 FED. R. CIV. P. 12(h)	2, 10, 13
22 FED. R. CIV. P. 81(a).....	10, 13

INTRODUCTION

2 In this action, four individuals (“Petitioners”) ask this Court to compel Blackhawk
3 Parent LLC and EOP Operating Limited Partnership (collectively, “Blackstone” or
4 “Respondents”) to provide disclosure of Blackstone’s relationships with various auditing firms in
5 connection with a desired arbitration of Petitioners’ claims against Blackstone under a Tax
6 Protection Agreement (the “Protection Agreement”) and to obligate Blackstone to agree on one
7 free from financial entanglements. Because the Protection Agreement requires the parties to
8 select a “nationally recognized *independent* public accounting firm,” Petitioners have been
9 asking Blackstone since March 2007 — for more than five months — to provide information
10 regarding Blackstone’s business relationships with the accounting firms Blackstone has proposed
11 as arbitrators. But Blackstone, one of the world’s largest and most powerful financial firms,
12 refuses to provide any information about how much it pays the firms it has offered up as
13 “independent” auditors. Because firms with multi-million dollar relationships with Blackstone
14 cannot be either “independent” under the Protection Agreement, or suitable arbitrators,
15 Petitioners have identified other firms that, to their knowledge, are “independent” and with
16 which, to Petitioners’ knowledge, Blackstone has no relationship. (See Decl. of Michael H.
17 Steinberg, Aug. 17, 2007 (“Steinberg Reply Decl.”) Exhs. A, B.) But Blackstone is just not
18 interested in selecting (or even proposing) an “independent” accounting firm.

19 Blackstone reveals its litigation strategy by its 23-page Opposition: avoid
20 addressing the merits at all costs. One must read through twenty pages of erroneous procedural
21 objections before addressing Blackstone’s position on the merits, and that position lacks any
22 merit: according to Respondents, the term “nationally recognized independent public accounting
23 firm” means only that Blackstone cannot put forward an “in-house” accounting department of
24 some company. (See Opp’n at 21.) No wonder Blackstone’s defense is revealed so late.

25 The rest of Blackstone’s Opposition is just the “kitchen sink” of procedural
26 objections, ranging from “standing” (which is really a mistaken ripeness challenge) to venue to
27 personal jurisdiction and even to the question of whether the intra-district assignment of this case
28 has been handled correctly (and it has). Not only does each of these objections fail, but

1 Blackstone did not even bother to assert them correctly, since personal jurisdiction and venue
 2 can only be raised by an answer or motion under FED. R. CIV. P. 12(b)(2) (personal jurisdiction)
 3 and FED. R. CIV. P. 12(b)(3) (venue), not by way of opposition. *See* FED. R. CIV. P. 12(h)(1).

4 Further, Respondents' objection to subject matter jurisdiction fails, since
 5 Respondents decline even to attempt to argue that the Washington limited partner they rely upon
 6 held her partnership interest at the time that the Petition was filed, which is the only relevant time
 7 period. *See, e.g., In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 809-10 (9th Cir. 1992) ("It is
 8 well-settled that the existence of complete diversity is assessed at the time of the filing of a
 9 complaint and that subsequent changes in the citizenship of an existing party do not affect the
 10 determination of jurisdiction.").

11 The rest of Respondents' Opposition consists of irrelevant attacks. So, while
 12 Respondents insult Petitioners' view on the merits (which is a complete waste of pages, since the
 13 merits are for the arbitrators, not this Court), Blackstone must feel that the only forum in which
 14 it can succeed is one where it has an ongoing and significant financial relationship with the
 15 "neutral" arbitrator (*i.e.*, selecting its own auditor). Respondents' rant reaches crescendo pitch
 16 when accusing Petitioners of "delay," even though Respondents could easily resolve this matter
 17 by providing the information Petitioners have been seeking for five months. Blackstone
 18 apparently claims that Petitioners should have accepted one of the Big Four accounting firms, no
 19 matter how grave the conflicts, just to move the ball forward. This is absurd. Despite further
 20 requests this month, Blackstone still has not — even today — disclosed any details of its
 21 relationships with the firms it has proposed or those proposed by Petitioners.

22 **ARGUMENT**

23 **I. DIVERSITY JURISDICTION IS PROPER, AND IN ANY EVENT PETITIONERS
 24 SHOULD BE ALLOWED TO TAKE JURISDICTIONAL DISCOVERY
 25 REGARDING THE ALLEGED WASHINGTON LIMITED PARTNER**

26 **A. Because the Washington Limited Partner Presumably Acquired Her Interest
 27 After the Petition Was Filed, the Court Has Diversity Jurisdiction**

28 When initially opposing the Petition, Respondents submitted a declaration by
 Matt Koritz, general counsel of Blackhawk Parent, identifying certain EOP limited partners as

1 citizens of California and Oregon. (Steinberg Reply Decl., at Exh. C (Decl. of Matt Koritz, Jul.
 2 20, 2007, ¶¶ 3-6.) Blackstone claimed that “[b]ecause EOP has limited partners who are
 3 citizens of California and Oregon, EOP is a citizen of those states.” (Resps.’ Mem. in Opp’n.,
 4 Jul. 20, 2007, at 12.) In all of the papers filed in opposition to the initial Petition, Respondents
 5 never mentioned any Washington-based limited partner of EOP.

6 Taking Blackstone and Mr. Koritz at their word, Petitioners amended their
 7 Petition, dropping any former Spieker limited partners living in Oregon or California.¹ Yet now,
 8 in response to the First Amended Petition, Mr. Koritz has submitted a new declaration. This
 9 time Mr. Koritz says, without any detail whatsoever, that, as of the date of his declaration
 10 (August 10, 2007), there now exists an EOP limited partner, Frances Hilen, who is supposedly a
 11 citizen of Washington State. (See Decl. of Matt Koritz, Aug. 10, 2007, ¶ 3.) But Respondents
 12 decline to provide evidence indicating *when* Ms. Hilen acquired her interest in EOP or the nature
 13 of that interest. Nor did Respondents include Ms. Hilen, or any other alleged EOP limited
 14 partner, in their Certificate of Interested Entities or Persons. (See Cert. of Interested Entities or
 15 Persons, Jun. 18, 2007, at 2.)

16 Because Blackstone never indicates *when* Ms. Hilen acquired her interest,
 17 Respondents presume that she became an EOP limited partner *after* the initial Petition was filed,
 18 and that Respondents did not intentionally omit Ms. Hilen from their original opposition papers
 19 to delay and impede these proceedings. If Ms. Hilen did acquire those interests after the Petition
 20 was initially filed, there would be no question that this Court has diversity jurisdiction over the
 21 Petition. *See In re Hawaii Fed. Asbestos Cases*, 960 F.2d at 809-10 (“[D]iversity jurisdiction is
 22 determined by the citizenship of the parties at the time of the filing of the complaint, not at the
 23 time the cause of action arose or after the action is commenced.”); *Mann v. Tucson Dep’t. of
 24 Police*, 782 F.2d 790, 794 (9th Cir. 1986) (same).

25 But while Blackstone’s evidence does not identify *when* Ms. Hilen acquired her
 26 interest, in briefing, Blackstone seems to assume — but does not directly state — that Ms. Hilen
 27

28 ¹ Those individuals are now pursuing a petition to compel arbitration in the Superior Court
 of the State of California, County of San Mateo.

1 may have been a limited partner at some point before. Indeed, Blackstone says only that it was
 2 “under no obligation” to mention her earlier. (Opp’n. at 12 n.4.) Of course, Blackstone could
 3 have been “under no obligation” to mention her if she was not a limited partner previously. But
 4 if Blackstone believes that it could omit from its prior papers material facts relating to
 5 jurisdiction, it is palpably wrong.

6 If Blackstone had played such a cute trick (omitting to name a Washington
 7 limited partner, in order only to cause Petitioners to amend their Petition and to brief another
 8 petition to compel), that conduct would violate 28 U.S.C. § 1927’s mandate that litigants not
 9 “multipl[y] the proceedings in any case unreasonably and vexatiously,” and would violate
 10 Blackstone’s counsel’s duty of candor to this Court. *See CAL. BUS. & PROF. CODE § 6068(d)* (a
 11 lawyer must “never seek to mislead the judge or any judicial officer by an artifice or false
 12 statement of fact or law”); *CAL. R. PROF’L. CONDUCT 2-100(B)* (“In presenting a matter to a
 13 tribunal, a member . . . [s]hall not seek to mislead the judge, judicial officer, or jury by an artifice
 14 or false statement of fact or law.”); *see also Moser v. Bret Harte Union High Sch. Dist.*, 366 F.
 15 Supp. 2d 944, 974 n.7 (E.D. Cal. 2005) (defendant’s “omission of relevant facts” from
 16 opposition warranted sanctions for duty of candor violation); *Sipper v. Capital One Bank*, No.
 17 01-9547, 2002 U.S. Dist. LEXIS 3881, *7 (C.D. Cal. Mar. 1, 2002) (plaintiff’s omission to
 18 mention material fact of “relationship between one of the attorneys in this action . . . and one of
 19 the named plaintiffs in this action” violated duty of candor); *Mendez v. Plastofilm Indus., Inc.*,
 20 No. 91 C 8172, 1992 U.S. Dist. LEXIS 5704, *11-12 (N.D. Ill. Apr. 15, 1992) (“Plastofilm’s
 21 insistence that the complaint was unclear” to give the appearance that removal on diversity
 22 grounds was proper “can only be seen as evidence of bad faith and lack of respect for the duty of
 23 candor toward the court”).

24 **B. Alternatively, Petitioners Should Be Permitted To Take Discovery Regarding**
 25 **the Alleged Washington Limited Partner’s Acquisition of Her Interest**

26 Assuming no artifice by Blackstone, Ms. Hilen must have acquired her interest in
 27 EOP *after* the Petition was filed. Nevertheless, to the extent that Blackstone may attempt to
 28 supplement the record to claim that, in fact, she held her interest before the original Petition was

1 filed, this Court is not required simply to take Respondents at their word that EOP has a
 2 Washington limited partner, particularly in light of Respondents' inexplicable failure to put
 3 forward that proof before. Accordingly, if the Court is not inclined to conclude that jurisdiction
 4 is proper based on the current record, Petitioners respectfully request that the Court allow
 5 discovery on Ms. Hilen's acquisition of her interest. *See Laub v. United States DOI*, 342 F.3d
 6 1080, 1093 (9th Cir. 2003) ("[D]iscovery should ordinarily be granted where pertinent facts
 7 bearing on the question of jurisdiction are controverted or where a more satisfactory showing of
 8 the facts is necessary"); *Sizova v. Nat'l. Inst. of Stds. & Tech.*, 282 F.3d 1320, 1326 (10th
 9 Cir. 2002) (court should have allowed discovery regarding subject matter jurisdiction because
 10 "[w]hen a defendant moves to dismiss for lack of jurisdiction, either party should be allowed
 11 discovery on the factual issues raised by that motion").

12 **II. THE COURT SHOULD REJECT RESPONDENTS' EFFORT TO STRIP
 13 "INDEPENDENT" OF ANY MEANING**

14 Respondents assert that the Protection Agreement allows them to select an
 15 arbitrator with significant and ongoing business relationships with Blackstone and its numerous
 16 affiliates, and to refuse to disclose information regarding those relationships, because an
 17 "independent" accounting firm supposedly means a "stand-alone (*i.e.* not captive), reputable,
 18 widely used and recognized accounting firm[]." (Opp'n. at 21.)

19 Respondents' authorities, however, do not even begin to support this view — *not*
 20 *one held that an accounting firm need not be free of conflicts to be "independent."* *See McGann*
 21 *v. Ernst & Young*, 102 F.3d 390, 391 (9th Cir. 1996) (simply referring to Ernst & Young as "an
 22 independent accounting firm"); *San Jose v. Price Waterhouse*, No. 91-16489, 1993 U.S. App.
 23 LEXIS 6801, *1 (9th Cir. Mar. 23, 1993) (saying only that Price Waterhouse was "the City's
 24 independent accounting firm"); *Blake v. Dierdorff*, 856 F.2d 1365, 1371 (9th Cir. 1988)
 25 (identifying "Arthur Young [as] Sun Saving's independent accounting firm"); *Container*
 26 *Recovery, Inc. v. Shasta Northwest, Inc.*, No. 05-1749, 2007 U.S. Dist. LEXIS 42620 (D. Or.
 27 Jun. 11, 2007) (saying nothing at all about accounting firms); *Vesta Fire Ins. Corp. v. Ins.*

¹ || Ventures, Inc. No. 02:04-cv-0. 2006 U.S. Dist. LEXIS 24887, *4-5 (E.D. Cal. Feb. 9, 2006).

2 (identifying "Baumann, Raymondo & Company" as "an independent accounting firm").

III. RESPONDENTS' SLEW OF PROCEDURAL OBJECTIONS ARE WITHOUT MERIT

A. **Respondents' Objection To "Standing" — Which Is Really a Challenge To Ripeness — Fails**

Because Respondents' argument on the merits fails, they instead make an argument that they characterize as based on "standing,"² asserting that "there has been no refusal

² Blackstone's argument is not really a "standing" argument. There is no question that the Petitioners have the "right" under a contract (*i.e.*, standing) to pursue their claim. Respondents' complaint actually appears to be that the Petition is unripe — *i.e.*, that Petitioners have not yet suffered an injury due to Respondents' refusal to arbitrate. No matter how this argument is framed, Blackstone invites error. *See Clearwater Ins. Co. v. Granite State Ins. Co.*, No. 06-4472, 2006 U.S. Dist. LEXIS 74771, *7-8 (N.D. Cal. Oct. 2, 2006) (petition to compel arbitration was "ripe for adjudication" because "[d]espite respondents' repeated insistence that they have been willing and able to proceed with the arbitration mechanism at all times, there is

1 to arbitrate as required under § 4 of the Federal Arbitration Act.” (Opp’n. at 12.) To make that
 2 assertion, Respondents simply ignore the FAA’s plain language. Section 4 of the FAA provides
 3 that a petition to compel arbitration may seek “an order directing that such arbitration proceed *in*
 4 *the manner provided for in such agreement.*” 9 U.S.C. § 4 (emphasis added). Respondents’
 5 apparent view that, so long as they agree to have some form of arbitration, the FAA permits them
 6 to ignore the terms of the arbitration clause is incorrect.

7 What is even more peculiar about this “standing” argument is that Blackstone has
 8 itself brought suit in Illinois, seeking to compel *Petitioners* to arbitrate under the FAA. (See
 9 Steinberg Reply Decl. Exh. D.) In that petition, Respondents “request that the Court order
 10 [Petitioners] to provide the requisite list of potential arbitrators and to negotiate in good faith so
 11 that the parties may jointly retain a nationally recognized independent public accounting firm.”
 12 (*Id.* Exh. D, ¶ 10.) Yet under the view Blackstone presents here, Blackstone lacks “standing” to
 13 assert that claim because Petitioners agree in principle to arbitrate. No explanation is offered for
 14 this obviously contradictory position.

15 Further still, Blackstone advances its contradictory position without the benefit of
 16 authority. Numerous decisions in this Circuit and others — which Respondents just ignore —
 17 hold that a party may seek an order under Section 4 requiring arbitration in accordance with the
 18 specific terms of the agreement, even if the other party agrees in principle to arbitrate. (See
 19 Mem. of Ps. & As. in Supp. of Am. Pet. to Compel Arb., Jul. 27, 2007, at 7.)

20 By refusing to provide information about the independence of the firms that
 21 Blackstone is proposing, Respondents have failed to comply with the Protection Agreement’s
 22 requirement that the parties jointly select a “nationally recognized independent public accounting
 23 firm” to arbitrate this dispute. (Decl. of Warren E. Spieker, Jr., Jun. 7, 2007 (“Spieker Decl.”),
 24 Exh. A ¶ 2(d).) Without any information regarding Respondents’ business relationships with the
 25 accounting firms Respondents have proposed, it is impossible for Petitioners to determine
 26 whether those firms are “independent” within the meaning of the Protection Agreement. (Decl.
 27

28 no doubt that the parties have failed to proceed, and that each party blames the other for this
 failure”).

1 of Michael H. Steinberg, Jun. 7, 2007 (“Steinberg Decl.”), Exh. H; *see also* § VI *infra*).
 2 Accordingly, Respondents have refused to arbitrate “in the manner provided for” by the
 3 Protection Agreement under Section 4.³

4 **B. The Court Has Personal Jurisdiction Over Blackhawk Parent**

5 **1. Blackhawk Parent has sufficient contacts with California.**

6 Respondents assert that the Court lacks personal jurisdiction over Blackhawk
 7 Parent because it did not exist when the Protection Agreement was executed. (Opp’n. at 16.)
 8 Respondents, however, ignore two key facts that clearly establish personal jurisdiction.⁴

9 **a. Blackhawk Parent is EOP Trust’s successor, and EOP Trust
 10 has extensive contacts with California.**

11 Blackhawk Parent is the *successor* to EOP Trust, EOP’s former general partner.
 12 (Petition ¶ 31; Decl. of Timothy J. Cornell, Aug. 10, 2007 (“Cornell Decl.”), Exh. C, at 6.) In
 13 the Blackstone Merger, EOP Trust merged with Blackhawk Acquisition Trust, which was later
 14 liquidated into Blackhawk Parent. (Cornell Decl. Exh. C, at 6.) EOP Trust, which was
 15 responsible for directing EOP’s business affairs prior to the Blackstone Merger, was central to
 16 (1) EOP’s acquisition of Spieker Properties (and hence the many Protected Properties located in
 17 California (Spieker Decl. Exh. A, at 141-43; Steinberg Reply Decl. Exh. E, at 138-42)); (2) the
 18 negotiation of the Protection Agreement; (3) the negotiation of the Spieker Merger, which
 19 partially occurred in California (Cornell Decl. Exh. A, at 43); and (4) the Blackstone Merger,

20
 21 ³ Respondents’ reliance (Opp’n. at 13) on *Hartford Accident & Indem. Co. v. Equitas Reins. Ltd.*, 200 F. Supp. 2d 102 (D. Conn. 2002), is misplaced. In *Hartford*, the plaintiff sent a letter to the defendants demanding that they agree to arbitrate the dispute at issue within thirty days, but then “initiated . . . th[e] litigation before the time set by Hartford for the arbitration defendants to accept or reject Hartford’s written request to arbitrate had expired.” *Id.* at 109. Unlike Respondents, the defendants in *Hartford* did not refuse to comply with any terms of the agreement to arbitrate. *See also Colt’s Mfg. Co. v. Devteck Corp.*, 961 F. Supp. 382, 384-85 (D. Conn. 1997) (denying Section 4 petition where defendant did not refuse to comply with any terms of arbitration agreement).

22
 23 ⁴ The California personal jurisdiction statute determines whether jurisdiction over
 24 Blackhawk Parent is proper, and “California’s long-arm statute permits this Court to exercise
 25 personal jurisdiction over nonresident defendants on any basis not inconsistent with the
 26 California or United States Constitution.” *Joe Boxer Corp. v. R. Siskind & Co.*, No. 98-4899,
 27 1999 U.S. Dist. LEXIS 9622, *10 (N.D. Cal. Jun. 25, 1999).

1 which triggered EOP's obligations under the Protection Agreement to several former Spieker
2 Properties limited partners located in California (*see* Petition to Compel Arbitration, Jun. 8,
3 2007).

4 Respondents have not disputed — and cannot dispute — that EOP and EOP Trust
5 had extensive contacts with California that are relevant to the Petition. Obviously, EOP manages
6 (and EOP Trust formerly managed) billions of dollars worth of real estate located in California.
7 (Steinberg Reply Decl. Exh. E, at 138-42.) Simply put, Respondents cannot dispute jurisdiction
8 over Blackhawk Parent, EOP Trust's successor. *See Richmond v. Madison Mgmt. Group, Inc.*,
9 918 F.2d 438, 455 (4th Cir. 1990) ("Because, as concluded above, there was evidence supporting
10 the imposition upon GHA of successor liability, it was proper for the district court to assert
11 personal jurisdiction over GHA."); *Hartog v. Jots, Inc.*, No. 03-2986, 2004 U.S. Dist. LEXIS
12 24267, *11-12 (N.D. Cal. Jan. 9, 2004) ("[A]s the successor-in-interest to McKinney &
13 Associates, this Court may exercise personal jurisdiction over Jot's if it can impute to Jot's the
14 previous purposeful availment of McKinney & Associates," which the court could do because
15 the "real estate of Jot's Resort, as well as the business operation," had passed "from McKinney
16 & Associates to Jot's Inc."); *No Touch N. Am. v. Blue Coral, Inc.*, No. 95-1103, 1997 U.S. Dist.
17 LEXIS 16153, *3 (C.D. Cal. May 30, 1997) (where defendant accepted assignment of trademark,
18 "by accepting this assignment, Hurand stepped into the shoes of Blue Coral, and Blue Coral's
19 acts are imputed to Hurand" for personal jurisdiction purposes).

b. Blackhawk Parent negotiated with the California-based former Spieker Properties partners regarding the arbitration and the underlying dispute.

22 Even if this Court decided to ignore the fact that Blackhawk Parent is the
23 successor to EOP Trust, that would not defeat personal jurisdiction. While Respondents
24 recognize that “the Amended Petition alleges a disagreement about the interpretation of an
25 arbitration clause in the [Protection Agreement]” (Opp’n. at 16), Respondents fail to
26 acknowledge that Blackhawk Parent has been negotiating with Petitioners on behalf of both itself
27 and EOP throughout that entire dispute. When Mr. Spieker — the former CEO of Spieker
28 Properties, who is based in California (Petition ¶ 23) — asserted his right to indemnification

1 under the Protection Agreement, Blackhawk Parent and its counsel extensively corresponded
 2 with Mr. Spieker concerning both that obligation and the conduct of the potential arbitration.
 3 (Spieker Decl. Exhs. C, F; Steinberg Decl. Exhs. B, E, H.) Blackhawk Parent accordingly has
 4 sufficient contacts with California to subject it to personal jurisdiction here. *See U. S. Titan, Inc.*
 5 v. *Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 153 n.13 (2d Cir. 2001) (in petition to
 6 compel arbitration case, personal jurisdiction over defendant proper in New York because “Zhen
 7 Hua sent telex or facsimile communications directly to Titan concerning arbitration” in New
 8 York); *nMotion, Inc. v. Envtl. Tectonics Corp.*, 196 F. Supp. 2d 1051, 1058-59 (D. Or. 2001)
 9 (where defendant’s “numerous contacts with Oregon over a period of at least several months . . .
 10 . included telephone calls, e-mails, and paper correspondence,” personal jurisdiction over
 11 defendant in Oregon proper); *OKI Am. v. Tsakanikas*, No. 93-20728, 1993 U.S. Dist. LEXIS
 12 19475, *8 (N.D. Cal. Dec. 6, 1993) (“Defendant Tsakanikas’ contacts with this forum, which
 13 included numerous correspondence by letter, facsimile and telephone to Plaintiff’s counsel,”
 14 subjected defendant to personal jurisdiction).

15 **2. Blackhawk Parent has waived the right to contest personal
 16 jurisdiction.**

17 Rather than moving to dismiss the Petition for lack of personal jurisdiction or
 18 filing an answer asserting that defense, Blackhawk Parent chose to file a “memorandum in
 19 opposition” raising that and other issues. Accordingly, Blackhawk Parent has waived any right
 20 to claim that the Court lacks personal jurisdiction over it. *See* FED. R. CIV. P. 12(h)(1) (“A
 21 defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion
 22 under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule
 23 15(a) to be made as a matter of course.”); *Hartford Fire Ins. Co. v. Evergreen Org., Inc.*, 410 F.
 24 Supp. 2d 180, 184 (S.D.N.Y. 2006) (because “the individual respondents appeared by counsel in
 25 opposition to the motion for provisional relief,” respondents to petition to compel arbitration
 26 waived right to challenge personal jurisdiction); *see also* FED. R. CIV. P. 81(a)(3) (“In
 27 proceedings under Title 9 U.S.C., relating to arbitration . . . these rules apply only to the extent
 28 that matters of procedure are not provided for in those statutes.”).

1 C. **Venue Is Proper in This District**⁵2 1. **Venue is proper under 28 U.S.C. § 1291(a)(1) because the Court has**
3 **personal jurisdiction over both Respondents.**

4 Under 28 U.S.C. § 1391(a)(1), venue is proper in “a judicial district where any
5 defendant resides, if all defendants reside in the same State.” Further, Section 1391(c) provides
6 that “a defendant that is a corporation shall be deemed to reside in any judicial district in which it
7 is subject to personal jurisdiction at the time the action is commenced.” 28 U.S.C. § 1391(c).
8 Limited partnerships and limited liability companies, such as EOP and Blackhawk Parent, are
9 treated as corporations in determining their “residences” under Section 1391(a)(1). *See Wells v.*
10 *Cingular Wireless LLC*, No. 06-03191, 2006 U.S. Dist. LEXIS 73664, *4 (N.D. Cal. Mar. 6,
11 2007) (under Section 1391(a)(1), limited liability company “is a resident of California” where it
12 was subject to personal jurisdiction in California); *MacCallum v. N.Y. Yankees Pshp.*, 392 F.
13 Supp. 2d 259, 264 (S.D.N.Y. 2005) (“Applying the corporate residence standards of section
14 1391(c) to [defendant partnership], venue will be proper pursuant to section 1391(a)(1) so long
15 as this court has personal jurisdiction over [defendant].”).

16 As Respondents do not contest that the Court has personal jurisdiction over EOP,
17 and the Court has personal jurisdiction over Blackhawk Parent (as described above), EOP and
18 Blackhawk Parent “reside” in this District under Section 1391(a)(1) and venue is proper here.

19 2. **Venue is proper under 28 U.S.C. § 1391(a)(2) because most of the**
20 **Protected Properties are located in this District.**

21 As yet another ground for the laying of venue, under Section 1391(a)(2), venue is
22 proper in a District in which “a substantial part of the property that is the subject of the action is
23 situated.” 28 U.S.C. § 1391(a)(2). Of the 90 Protected Properties, 48 are located in this District.
24 (Spieker Decl. Exh. A, at 141-43; Steinberg Reply Decl. Exh. E, at 138-42.) The Protected
25 Properties are central to the dispute over EOP’s indemnity obligations because that dispute

26
27 ⁵ Respondents accuse Petitioners of “ignor[ing] their obligation to address Intradistrict
28 Assignment” (Opp’n. at 16), but doing so in the Amended Petition was unnecessary because this
action has already been assigned to a Division of the Court. *See* N.D. Cal. L.R. 3-2(c).

1 concerns whether the Blackstone Merger constituted a “direct or indirect sale, exchange or other
 2 disposal” of the Protected Properties under the Protection Agreement. (Petition ¶¶ 27, 34-35.)
 3 Thus, a substantial part of the property at issue in this action — *i.e.*, the Protected Properties —
 4 is located in this District, and venue is proper here. *See Reilly v. Chambers*, 215 F. Supp. 2d
 5 759, 764 (D. W. Va. 2002) (venue proper in West Virginia because “the very property that is at
 6 the center of the parties’ dispute is located in this State” and contract at issue was for sale of such
 7 property); *Champion Int’l. Corp. v. Bennett Forest Indus., Inc.*, 637 F. Supp. 170, 171 (D. Mont.
 8 1986) (venue proper in Montana because case concerned “purchase of certain real property and
 9 related assets in Ravalli County, Montana”).

10 **3. Venue is proper under 28 U.S.C. § 1391(a)(2) because the Spieker
 11 Merger occurred, and this dispute arose, in this District.**

12 As yet another independent basis for venue, under Section 1391(a)(2), venue is
 13 proper in “a judicial district in which a substantial part of the events or omissions giving rise to
 14 the claim occurred.” 28 U.S.C. § 1391(a)(2). Here, (1) most of the Protected Properties are
 15 located in this District (Spieker Decl. Exh. A, at 141-43; Steinberg Reply Decl. Exh. E, at 138-
 16 42); (2) the Spieker Merger was partially negotiated, and Spieker Properties was located, in this
 17 District (Cornell Decl. Exh. A, at 43); (3) Blackhawk Parent and its counsel sent correspondence
 18 concerning the underlying dispute and the potential arbitration to Mr. Spieker, acting on behalf
 19 of the former Spieker Properties limited partners (many of whom are located in this District) and
 20 their counsel, who are located in this District (Spieker Decl. Exhs. C, F; Steinberg Decl. Exhs. B,
 21 E, H); and (4) EOP has refused to meet its indemnity obligations to the California-based former
 22 Spieker Properties partners. Accordingly, a substantial part of the events or omissions giving
 23 rise to Petitioners’ claims occurred in this District. *See OKI Am.*, 1993 U.S. Dist. LEXIS 19475,
 24 *10 (because “[t]he claim itself was a direct result of Defendant’s repeated threats to institute
 25 patent infringement litigation against Plaintiff” and “[t]hese threats were directed to this district”
 26 although defendant was located outside district, venue was proper); *Largotta v. Banner
 27 Promotions, Inc.*, 356 F. Supp. 2d 388, 391 (S.D.N.Y. 2005) (venue proper in New York

28

1 regarding contract finalized outside New York because “at least one party to the conversations
 2 (Largotta) was always in New York”).

3 **4. Respondents have waived the right to challenge venue.**

4 Respondents were required to move to dismiss this action for lack of venue or
 5 assert that defense in an answer to preserve their right to contest venue. Respondents have failed
 6 to do so, and thus they cannot claim that venue is improper in this District. *See* FED. R. CIV. P.
 7 12(h)(1) (“A defense of . . . improper venue . . . is waived . . . if it is neither made by motion
 8 under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule
 9 15(a) to be made as a matter of course.”); *Lynch v. Alaska Tanker Co., LLC*, No. 03-2484, 2004
 10 U.S. Dist. LEXIS 22930, *8 (N.D. Cal. Nov. 4, 2004) (because “Defendant did not file its
 11 motion to dismiss for improper venue within twenty days after being served with the complaint
 12 as required by Federal Rule of Civil Procedure 12,” defendant waived right to contest venue);
 13 *see also* FED. R. CIV. P. 81(a)(3).

14 **D. The Petition Is Proper Under the Tax Protection Agreement**

15 Respondents next assert that the Protection Agreement requires the issue of
 16 whether the parties have selected a “nationally recognized independent public accounting firm”
 17 to be arbitrated, and thus that this suit is improper. (Opp’n. at 19.) Blackstone’s argument
 18 disregards the Protection Agreement’s plain language.

19 Section 2(a) of the Protection Agreement requires EOP “not to directly or
 20 indirectly sell, exchange, or otherwise dispose of any Protected Property.” (Spieker Decl. Exh.
 21 A ¶ 2(a).) Further, “[i]f [EOP] has breached or violated the covenant set forth in Paragraph
 22 2(a),” the parties agreed “to negotiate in good faith to resolve any disagreements regarding any . . .
 23 . breach or violation and the amount of damages” resulting from EOP’s breach of that covenant.
 24 (*Id.* ¶ 2(d).) If “any such disagreement,” *i.e.*, a disagreement over whether EOP breached its
 25 obligations under Section 2(a), “cannot be resolved,” the parties “shall jointly retain a nationally
 26 recognized independent public accounting firm . . . to act as an arbitrator to resolve as
 27 expeditiously as possible all points of any such disagreement” (*Id.*) In other words, the
 28 Protection Agreement only provides that the arbitrator is to resolve “disagreements” concerning

1 the existence and extent of *EOP's indemnity obligation* — not “disagreements” concerning the
 2 arbitrator's own independence from the parties.

3 This action does not concern the existence or extent of EOP's indemnity
 4 obligation, which are issues for the arbitrator to decide — it is about the selection of the
 5 arbitrator to decide those issues. Accordingly, the Protection Agreement does not require the
 6 arbitrator to determine its own independence. *See Cummings v. FedEx Ground Pkg. Sys.*, 404
 7 F.3d 1258, 1262 (10th Cir. 2005) (because “[b]y its terms, the arbitration clause in the Operating
 8 Agreement only covers acts by [defendant] to terminate the Operating Agreement,” and plaintiff
 9 did not allege that defendant terminated the agreement, plaintiff's claim was non-arbitrable);
 10 *Tracer Rsrch. Corp. v. Nat'l. Env'tl. Servs. Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994) (where
 11 agreement provided for arbitration “in the event any controversy or claim arising out of this
 12 Agreement cannot be settled by the parties,” tort claim not arbitrable because it did not “arise out
 13 of the Agreement”); *Mediterranean Enters. v. Ssangyong Corp.*, 708 F.2d 1458, 1463 (9th Cir.
 14 1983) (where arbitration clause provided that “[a]ny disputes arising hereunder or following the
 15 formation of joint venture shall be settled through binding arbitration,” tort claims, which did not
 16 “arise under” the agreement, were not arbitrable).⁶

17 Moreover, Section 5 of the FAA specifically authorizes the Court to order
 18 Respondents to follow the arbitrator selection method designated by the parties. *See* 9 U.S.C. § 5
 19 (“If in the agreement provision be made for a method of naming or appointing an arbitrator . . .
 20 and any party thereto shall fail to avail himself of such method, . . . then upon the application of

21

22 ⁶ By contrast, Respondents' authorities (Opp'n. at 19-20) concerned arbitration
 23 clauses requiring the arbitrator to decide *all* issues concerning the contract — not just disputes
 24 regarding the respondent's liability or damages. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S.
 25 444, 451-52 (2003) (because contract required arbitrator to decide “all disputes, claims, or
 26 controversies arising from or relating to this contract or the relationships which result from this
 27 contract,” parties’ “dispute about . . . whether [the agreement] forbids the use of class arbitration
 28 procedures[] is a dispute ‘relating to this contract’” and thus arbitrable); *Howsam v. Dean Witter
 Reynolds*, 537 U.S. 79, 86 (2002) (where NASD rule stated that “arbitrators shall be empowered
 to interpret and determine the applicability of all provisions under this Code,” Code
 interpretation issue was for arbitrator to decide); *Trustmark Ins. Co. v. Fire & Casualty Ins. Co.*,
 No. 02 C 0934, 2002 U.S. Dist. LEXIS 7923, *3 (N.D. Ill. May 2, 2002) (where arbitration
 clause provided that “in the event of any dispute . . . with respect to this Contract, it is hereby
 mutually agreed that such dispute or difference of opinion shall be submitted to arbitration,”
 arbitrator required to decide hearing location).

1 either party to the controversy the court shall designate and appoint an arbitrator"); *ATSA of*
 2 *Cal, Inc. v. Continental Ins. Co.*, 702 F.2d 172, 176 (9th Cir. 1987) (directing "the parties [to]
 3 select an arbitral panel without recourse of the ICC unless they are unable to agree upon an
 4 umpire," as "[u]nder 9 U.S.C. § 5, the parties' method of appointing arbitrators must be
 5 followed"); *Fireman's Fund Ins. Co. v. Sorema N. Am. Reins. Co.*, No. 94-3617, 1995 U.S. Dist.
 6 LEXIS 22236, *8-9 (N.D. Cal. Sept. 7, 1995) (granting petitioner's "request for a completed
 7 disclosure statement from each appointed and nominated arbitrator . . . in accordance with the
 8 terms of the agreement" because "the court has jurisdiction to regulate disclosures by proposed
 9 arbitrators based on its ability to enforce the terms of the agreement"). Respondents' assertion
 10 that arbitrator selection is presumptively "made outside of court" (Opp'n. at 20) cannot be
 11 squared with the Court's explicit statutory authority to enforce the parties' arbitrator selection
 12 procedure.⁷

13 Dated: August 17, 2007
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25 ⁷ Respondents point out that "[a]rbitration organizations . . . have devised widely-
 26 recognized procedures for selection of an arbitrator" (Opp'n. at 20 n.6), but this is a *non sequitur*.
 27 The Protection Agreement does not state that an "arbitration organization" will select the
 28 arbitrator — it provides that the parties will do so "jointly" (Spieker Decl. Exh. A ¶ 2(d)) — and
 Respondents have failed to participate meaningfully in that joint selection process by refusing to
 disclose their relationships with the accounting firms they propose. Nor do Respondents explain
 why an "arbitration organization" rather than the accounting firm the parties select should
 determine the rules under which to proceed.